EPR HOLDINGS SDN BHD A

v.

MARINA BUJANG & ANOR

HIGH COURT SABAH AND SARAWAK, KUCHING B
DAVID WONG DAK WAH JC
[ORIGINATING SUMMONS NO: 24-21-2007-III]
30 APRIL 2007

CIVIL PROCEDURE: *Costs - Liability to pay costs- Withdrawal of action - Whether costs to be awarded - Whether plaintiff ought to pay costs to defendants - Whether costs on full indemnity basis awarded* C

The plaintiff took out an originating summons (encl. 2) against the first and second defendants for, *inter alia*, a declaration that the plaintiff was the rightful proprietor of a certain amount of money. Subsequently, during a hearing, counsel for the plaintiff was asked whether there was any money claimed by the plaintiff which was still in the hands of the second defendant, to which she had replied in the negative. The plaintiff's counsel conceded that the present encl. 2 was not the correct mode in dealing with the dispute between the plaintiff and the first defendant and proceeded to withdraw encl. 2 but with the condition that no cost was to be awarded. The first and second defendants objected to that condition and asked for costs on a full indemnity basis. The issues that arose were (1) whether or not the plaintiff ought to pay costs for dismissal of the summons in chambers and the striking out of the originating summons to both the defendants and (2) whether the costs should be on a full indemnity basis. D E F

Held: G

(1) The counsel was not properly briefed by her clients. It was not disputed that the first defendant had resigned on 11 September 2006 and there was no explanation as to what the plaintiff had done from the date of the first defendant's resignation to the date of filing of this action to investigate the true status of the amount owing by the first defendant. It took the court not more than six hours to find out that the fixed deposit which the plaintiff wanted to freeze had been uplifted and that exact amount allegedly owed by the first defendant was only RM74,850. It was also not reasonable for the plaintiff to say that they could not have found this out H I

when they must have had all the relevant documents with them and had so much time to do the investigation. Further, the control of the plaintiff was no longer in the hands of the first defendant and any accountant could have easily found out the true status of the claim between the plaintiff and the first defendant. (para 18)

(2) There is a duty on the part of counsel to ensure that his or her clients had given proper instructions before a case is taken up. Counsel should not take whatever instructions given as the truth. There is a duty to make the appropriate inquiries. The plaintiff had not made sufficient investigation before they briefed the counsel. What happened here (failure to fully investigate) provided sufficient ground in which costs on a full indemnity basis should be awarded. (paras 19 & 20)

[Costs to the first and second defendant on a full indemnity basis to be taxed for the dismissal of encl.2 and the dissolution of the ex parte injunction. Enquiry into damages sustained by the first and second defendants as a result of the ex parte inunction be held before the senior assistant registrar.]

Case(s) referred to:

Malayan Thread Co Sdn Bhd v. Kawan Supermarket Sdn Bhd [1990] 1 MLJ 62 ***(refd)***

Pen Apparel Sdn Bhd v. Leow Chooi Khon & Ors [1995] 4 CLJ 606 HC ***(refd)***

Re Elgindata Ltd (No 2) [1993] 1 All ER 232 ***(refd)***

Zainur Zakaria v. PP [2001] 3 CLJ 673 FC ***(refd)***

Other source(s) referred to:

Ian S Goldrein & KHP Wilkenson, *Commercial Litigation: Pre Emptive Remedies*, 2nd edn, p 27

For the plaintiff - Christina Eng
For the 1st defendant - Shanker Ram; M/s Thomas, Shanker, Ram & Co
For the 2nd defendant - Gabriel Wong; M/s Detta Samen & Co

Reported by Suhainah Wahiduddin

JUDGMENT

David Wong Dak Wah JC:

Background

[1] The plaintiff on 25 January 2007 took out an originating summons (encl. 2) against the 1st and 2nd defendants for the following declarations:

1. A declaration that the plaintiff is the rightful proprietor of the money in the sum of RM264,850 and any interest accruing therefrom held under a Fixed Deposit No 211038232734 registered in the defendant's name ("fixed deposit");

2. that the 1st defendant is restrained, whether by herself or by her servant or agent or otherwise from withdrawing the sum of RM264,850 and any interest accruing therefrom belonging to the plaintiff from the fixed deposit account until the disposal of the originating summons;

3. that the 2nd defendant pays the sum of RM264,850 and any interest accruing therefrom belonging to the plaintiff from the fixed deposit account to the plaintiff within seven days from the date of this order in any manner deemed fit by the plaintiff;

4. alternatively, the 1st defendant pays the sum of RM264,850 to the plaintiff within seven days from the date of this order in any manner deemed fit by the plaintiff;

5. costs of this application to be borne by the defendants; and

6. further or any other order deemed fit and just by this Honorable Court.

[2] On the very next day, the plaintiff took out an *ex parte* summons in chambers (encl. 4) for several injunctive reliefs. The application was heard on 26 January 2007 by this court wherein the plaintiff obtained an order in terms as prayed for in encl. 4. The return date for encl. 4 was fixed on 12 February 2007 and this is what transpired in court:

Eng: I am asking for an adjournment as I still do not have all the documents.

Court: Can Mr Wong confirm that the amount of RM264,850.00 is still in the bank?

Wong: Could I have this matter stood down for ten minutes so that I can answer the court?

Court: This matter is stood down for Mr. Wong to contact the bank to confirm the question asked by the court?

9.57 am. – 12.2.2007

10.30 am – Resumption of hearing

Ram: Parties as before except my colleague Mr Francis Teron has just joined me.

Wong: My client confirms that there is a sum of RM385,937.72 in the 1st defendant account – 211038232734. However the 2nd defendant is still not able to ascertain whether this sum is pledged against the bank guarantee of RM264,850.00. Maybe I can ascertain this issue before 2 pm this afternoon.

Court: In the circumstances, I adjourn this to 2 pm for continued hearing.

2.16 pm – continuation of hearing

Parties as before

Wong: I confirm that the whole amount of RM264,850.00 together with interests was uplifted on 20.7.2005. This amount refers to the bank guarantee dated 23.12.2004 – BGP5220122.

Eng: As the money is no more there, the injunction dated 25.1.2007 is no longer relevant.

Ram: In the circumstances, I ask that the injunction be set aside with the cost and damage issues to be dealt with later.

Wong: I have no objection to what is suggested by Mr Ram.

Eng: The same goes with me.

Court: In the circumstances, I set aside the injunction dated 25.1.2007. As for costs and damages issues, I adjourn this for 14.3.2007 at 9am for argument. In respect of enclosure 13 (application to amend the Originating Summons) I also adjourn the same to the 14.3.2007 at 9 am.

[3] On 14 March 2007 hearing, I enquired from the plaintiff's counsel, Ms Christina Eng (Ms Eng) whether or not there is any money claimed by the plaintiff which is still in the hands of the 2nd defendant. She replied in the negative, to which I asked whether or not the present encl. 2 is the correct mode in dealing with the dispute between the plaintiff and the 1st defendant. She then conceded that it was not and proceeded to withdraw the encl. 2 but with the condition that no cost is to be awarded. Naturally Mr. Shanker Ram (Mr. Ram), counsel for the 1st defendant, and Mr. Gabriel Wong (Mr. Wong), counsel for the 2nd defendant, objected to that condition. Both counsels asked for costs on a full indemnity basis. Some forty minutes was taken up by the submissions of counsel on the issue of costs and I fixed my ruling on 23 March 2007.

New Twist

[4] This matter took a twist when Ms Eng two days later wrote to the senior assistant registrar the following letter:

Senior Assistant Registrar
High Court III
Kuching

16th March 2007
Urgent/By Hand

(Attention: Encik Zulhazmi Abdullah)

Re: Originating Summons No. 24-21-07-III
EPR Holdings Sdn Bhd v. Marina Binti Bujang & Anor

We crave leave to refer to the above matter and the hearing on the morning of 14th March 2007 before the Honourable Judge, whereat the undersigned being counsel for the Plaintiff had agreed to withdraw the above action.

The Honourable Judge had then proceeded to hear submission on costs before striking out the Originating Summons. The court has then adjourned the ruling for costs to the 23rd March 2007.

In the meantime, on the morning of 14th March 2007, before appearing before the Honourable Judge, the Plaintiffs have also filed a Summons in Chambers for leave to amend the Originating Summons.

Please be advised that we now have strict instructions from the Plaintiffs NOT to withdraw the Originating Summons and to request that the Summons in Chambers we filed on the morning of 14th March 2007 be heard on or before the 23rd March 2007 and before Yang Arif's ruling on costs.

We apologise for any inconvenience caused.

Thank you

Yours faithfully,
C J ENG ADVOCATE

CHRISTINA ENG
Cc clients
M/s Thomas, Shankar Ram & Co Advocates
M/s Detta Samen & Co Advocates

[5] Upon being informed of that letter I directed the SAR to fix encl. 47 (the application to amend encl. 2) for hearing on 23 March 2007 before me. Ms Eng at the hearing submitted that after the hearing on 14 March 2007 "she had subsequently discussed this matter with the plaintiff and the consensus reached between the client and counsel was that the client had at all material time every intention to proceed with the application to amend its originating summons. On this premise, the plaintiff had instructed its counsel to take the necessary action to inform the Honourable Court of this position" and to advance her cause she referred me to the decision of the Federal Court in the case of *Zainur Zakaria v. PP* [2001] 3 CLJ 673 which restated the duty of an advocate and solicitor as owing a duty to his client to act fearlessly and uphold the interest of his client, the interest of justice and the dignity of the profession regardless of any unpleasant consequences but in doing so not overstepping the boundaries between legal duty and contempt.

[6] Both Mr. Ram and Mr. Wong submitted encl. 2 for all intent and purpose had been withdrawn and to hold otherwise would be against what transpired at the hearing on 14 March 2007.

[7] What is stated in *Zainur Zakaria v. PP (supra)* is just a restatement of basic duty of every counsel but how it has any bearing in this matter with respect I cannot see. The crucial and only issue in the new twist was whether Ms Eng by her conduct had effectively withdrawn encl. 2. I read and re read and carefully considered what transpired at that hearing and came to the conclusion that she had effectively withdrawn encl. 2. I may not have on record struck out the matter but the conducts of counsels spoke for themselves in that some forty minutes were spent on submissions on the issue of costs only by counsels.

[8] So accordingly, I held that encl. 2 had been effectively struck out and consequently encl. 47 (the application to amend encl. 2) and encl. 13 (application to strike out encl. 2) were also struck out.

[9] Before I leave this topic, I must confess that I am a bit baffled by the conducts of the plaintiff. The claim by the plaintiff against the 1st defendant is now only RM74,850 which is within the jurisdiction of the Sessions Court. I had at 14 March 2007 hearing pointed out to Ms Eng the followings:

1. the mode of originating summons in this case is not proper as there are substantial dispute of facts between the parties. (to which she agreed at 14 March 2007 hearing and withdrew encl. 2)

2. The proper forum would be the Sessions Court as the sum concerned only RM74,850 (see *Pen Apparel Sdn Bhd v. Leow Chooi Khon & 2 Others* [1995] 4 CLJ 606).

[10] Despite that she saw fit to prepare a seven page submission together with a bundle of authorities comprising more than 100 pages to revive encl. 2, where she could have without prejudice to the plaintiff very easily filed a suit in the Sessions Court. Her action also caused Mr. Ram to prepare for the hearing a submission and a bundle of authorities comprising 122 pages. Without being disrespectful, counsels must realize that they have not only a duty to act fearlessly for the client but also a duty to conduct litigation in an efficient way for the clients and courts in terms of costs and time. What had happened here is that this court and counsels had to spend a few hours to listen, read and consider counsels' submissions which would have been avoided if the plaintiff had just taken a suit in the Sessions Court. In my

A view not only there has been wastage of judicial time, there was also wastage of counsels' time in preparing their submissions and bundle of authorities.

Issues

B **[11]** I come back to the issues of costs which are:

1. whether or not the plaintiff ought to pay costs for dismissal of the summons in chambers and the striking out of the originating summons to both the defendants; and

C 2. whether the costs should be on a full indemnity costs.

[12] In respect to issue 1, the general discretion of the court is governed by O. 59 r. 3(2) which states as follows:

D > (2) if the court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the court shall, subject to this Order, order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.

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[13] In *Re Elgindata Ltd (No 2)* [1993] 1 All ER 232, the court at p. 237 set out the following principles:

> The principles are these. (1) Costs are in the discretion of the
F court. (2) They should follow the event, except when it appears to the court that in the circumstances of the case some other order should be made. (3) The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails, but where that has caused a significant increase in the length or cost of the proceedings he
G may be deprived of the whole or part of his costs. (4) Where the successful party raises issues or make allegations improperly or unreasonably, the court may not only deprive him of his costs but order him to pay the whole or part of the unsuccessful party's costs. Of these principles, the first, second and fourth are
H expressly recognized or provided for by rr. 2(4), 3(3) and 10 respectively. The third depends on well-established practice. Moreover, the fourth implies that a successful party who neither improperly nor unreasonably raises issues or makes allegations on which he fails ought not to be ordered to pay any part of the unsuccessful party's costs.

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[14] As for the second issue, the relevant principles are set out in *Malayan Thread Co Sdn. Bhd. v. Kawan Supermarket Sdn. Bhd.* [1990] 1 MLJ 62 at p. 63-64:

> As I have said the only issue before me was the question of who should bear the cost in the circumstances, whether the petitioner or the applicant, and it is settled law that cost is in the discretion of the court and such discretion is to be judicially exercised. One of the relevant factors that weighed on the court to give costs was whether the process of the court had been abused as to warrant the court to award cost against the petitioner. For this we have to look back at the facts of this particular case whether the filing of the petition by the petitioner on 10 January 1988 was showing such abuse. … It is being said time and time again that the court should be wary that its process should not be abused and the court will not allow its list being cluttered and will award costs to punish those who do so. In the context of our present backlog today, the conduct of the petitioner in this instant case left much to be desired for by their filing one more unnecessary suit when the courts are seriously attempting to bring down such backlog, judicial time has been wasted in addition to the unnecessary trouble and expense the petitioner was causing the applicant. I agree with the applicant's counsel's contention that the petition was vexatious. Counsel must also have judicial notice of the backlog the court is facing and since counsel for the petitioner has not done so, I therefore award costs against the plaintiff in this matter. By the same order I also refused the applicant's counsel's prayers that solicitor and client cost be awarded to the applicant. I did so because on the authority of *Karpal Singh v. Atip bin Ali* [1987] 1 MLJ 291, counsel can be made to pay the cost of the action if the suit is conspicuously unmaintainable. I rule that this is not the case in our present petition.

Plaintiff's Contention

[15] The crux of Ms Eng's submission is this. The plaintiff was operating from a position of disadvantage in that the 1st defendant had all the relevant documents in her possession. Because of this disadvantage the plaintiff was not able to know all the relevant facts. She also contended that the 1st defendant never replied to the plaintiff's letter (EPR10) dated 24 November 2006 and had she replied the plaintiff would have known all the whereabouts of the relevant documents and the true position of the alleged debt due from the 1st defendant. She further contended that the 2nd defendant gave the plaintiff incomplete information by their letter dated 23 December 2004 in respect of money being held by them on behalf of the 1st defendant.

A **1st Defendant's Contention**

[16] Mr. Ram submitted that EPR 10 (dated 24 November 2006) did not require the 1st defendant to reply within a specified time. Nor did the letter state that the plaintiff did not have the relevant
B documents. Furthermore there was no mention that an *ex parte* injunction will be taken out by the plaintiff. Finally Mr. Ram informed the court that the 1st defendant had resigned from the plaintiff since 11 September 2006, a fact which is not denied by Ms Eng. In short what Mr. Ram was saying is that the plaintiff
C should have properly advised their solicitors before taking out this action and the *ex parte* injunction.

2nd Defendant's Contention

[17] Mr. Wong submitted that the plaintiff should have known
D how much of the fixed deposit relates to the relevant government project. It was not the duty of the 2nd defendant to know the nature of dispute between the plaintiff and the 1st defendant. Finally EPR12 was written in reply to EPR11. To blame the 2nd defendant for the plaintiff's action would be against the reality of
E the situation.

Findings Of The Court

[18] After considering the documents filed and the submissions by
F learned counsels, I am of the view that this is a case where the counsel was not properly briefed by her clients. My view is based on these reasons. Firstly, it is undisputed that the 1st defendant had resigned on 11 September 2006 (encl. 38 para. 1) and there was no explanation as to what the plaintiff had done from the
G date of 1st defendant's resignation to the date of filing of this action to investigate the true status of the amount owing by the 1st defendant. Secondly, if one looks at the notes of proceedings, one will note that it took the court not more than 6 hours to find out that the fixed deposit which the plaintiff wanted to freeze had
H been uplifted and that exact amount allegedly owed by the 1st defendant was only RM74,850. Thirdly, it is not reasonable for the plaintiff to say that they could not have found this out when they must have all the relevant documents with them and had so much time to do the investigation. The relevant fixed deposit of
I RM264,800 was in fact uplifted in 20 July 2005. Fourthly, the control of the plaintiff is no longer in the hands of the 1st defendant and any accountant worth his or her salt could have

easily found out the true status of the claim between the plaintiff and the 1st defendant. Accordingly I find that Ms Eng's complaints of non reply to EPR10 and the reply of the 2nd defendant in EPR12 are without merit.

[19] Finally let me state the obvious and that is there is a duty on the part of counsel to ensure that his or her clients had given proper instructions before a case is taken up. Counsel should not take whatever instructions given as the truth. There is this duty to make the appropriate enquiries. Mr. Ram has referred me to p. 27 of the book – *Commercial Litigation: Pre Emptive Remedies* 2nd edn by Ian S Goldrein and KHP Wilkenson, which I fully agree and it states:

> Moreover, the duty to make full disclosure in appropriate cases requires that the plaintiff makes sufficient enquiries before making his application. The legal advisers shall probe and dig into the background of the case.

[20] In considering whether the defendants should be awarded costs on a full indemnity basis, I take into consideration of the fact that the plaintiff had not made sufficient investigation before they briefed Ms Eng. Had they done so, we would have only one suit filed in the Sessions Court and not a suit in the High Court and four chambers hearing in this court. I concede that the plaintiff did not file a suit which was "conspicuously unmaintainable" which would be a ground to award costs on a full indemnity basis. Nevertheless in my view what happened here (that is failure to fully investigate) provides sufficient ground in which costs on a full indemnity basis should be awarded.

[21] For all the reasons stated above, I award costs to the 1st and 2nd defendant on a full indemnity basis to be taxed for the dismissal of encl. 2 and the dissolution of the *ex parte* injunction dated 25 January 2007. I also order that an enquiry into damages sustained by the 1st and 2nd defendants as a result of the *ex parte* injunction dated 25 January 2007 be held before the senior assistant registrar.